



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL CASE 45 OF 2006

REPUBLIC.....PROSECUTOR

-VERSUS-

ANGELINE MORAA OMWENGA.....1ST ACCUSED

SAMUEL MBUGUA MAINA2ND ACCUSED

JUDGMENT

A. BACKGROUND TO TRIAL PROCEEDINGS

In this case, in which trial was resumed *de novo*, the Attorney-General filed an Information dated 8th May, 2006 alleging in respect of the accused persons, murder contrary to s. 203 as read with s. 204 of the Penal Code (Cap. 63, Laws of Kenya). The accused persons, it was particularized, on 23rd August, 2004 at Mukuru Kwa Njenga Village in Embakasi, within Nairobi Area, jointly murdered **Nicholas Kimeu Jones**.

When this matter was first mentioned on 1st November, 2004 before **Lady Justice Rawal** it was noted that 1st accused was aged 17 years, that is, a “child” within the terms of the Children act, 2001 (Act no. 8 of 2001), section 2. The matter was mentioned several times (on 10th November, 2004 before **Rawal, J**; on 2nd April, 2006 before **Ombija, J**; and on this occasion the proceedings were declare a mistrial; before me on 9th May, 2006; before **Apondi, J** on 15th May, 2006); and I began hearing it with assessors on 25th September, 2006. I discharged the assessors on 30th January, 2008 following the entry into force of amendments to the Criminal Procedure Code (Cap. 75, Laws of Kenya) which repealed all provisions of the law creating a role in trial for assessors.

B. PROSECUTION EVIDENCE

Rose Namwana Sikuku (PW1), Government Analyst with Government Chemist, was asked by Police Constable **Joseph Maina Ndung’u** (PW11) of Embakasi Police Station to examine blood-stains soiling certain items, on 3rd September, 2004 and 13th September, 2004: these items were – a cream-white pair of trousers; a cream -purple black T-shirt – all in a Khaki envelope, and marked “Deceased”; a grey pair of trousers, a blue-grey sleeveless T-shirt and a dark-blue jacket – all in one Khaki envelope and marked “Accused **Samuel Mbugua**”; a blue pair of Jeans trousers in a Khaki envelope marked “Accused

Angeline Moraa”; a kitchen knife wrapped in an old newspaper; blood sample in a bottle marked “Deceased **Nicholas Kimeu Jones**”; blood sample in a bottle marked “**Samuel Mbugua**”; and blood sample in a bottle marked “**Angeline Moraa**.”

PW1’s findings were as follows:

- (i) The cream-white pair of trousers and the cream-purple-black T-shirt marked “Deceased” – was moderately stained with blood of human origin.
- (ii) The grey pair of trousers, blue-grey sleeves T-shirt – both marked “**Samuel Mbugua**”, and the blue pair of trousers marked “**Angelina Moraa**” – were all moderately stained with blood of human origin.
- (iii) The dark-blue jacket marked “**Samuel Mbugua**” was lightly stained with blood of human origin.
- (iv) The kitchen knife: no blood stains were detected.
- (v) No DNA profiles were generated from the blood-stains on the cream-white pair of trousers or the cream-purple-black T-shirt both marked “Deceased”.
- (vi) The DNA profiles generated from other items were tabulated, and recorded in a report.

PW1 drew certain conclusions:

- (i) DNA profiles from blood stains on the grey pair of trousers, and the dark-blue jacket both marked “**Samuel Mbugua**” and from the blue pair of Jeans trousers marked “**Angelina Moraa**” – matched DNA profiles generated from the blood sample marked “**Nicholas Kimeu Jones**”;
- (ii) DNA profile from blood stains on blue-grey sleeveless T-shirt marked “**Samuel Mbugua**” – carried a mixture of DNA profiles generated from blood samples marked “Deceased **Nicholas Kimeu Jones**” and “**Samuel Mbugua**”.

Jones Musili Mulinge (PW2) had travelled from Mbooni to Nairobi on the material date (23rd August, 2004), arriving at 7.30pm, and went to Mukuru Kwa Njenga to see a daughter of his. As soon as he got to her daughter’s house, PW2 was visited by three young men, one of them being **Anthony Kamau**, (PW8) who was a friend of the deceased. **Kamau** informed PW2 that “**Nick**” (the deceased) was in distress and was dying, a short distance away. PW2 joined the young men, and they went up to *Alice Clinic*, where the deceased had just been taken. PW2 found that his son (the deceased) had been stabbed, and a doctor was in the course of stitching up the stab-wound in the chest.

It was PW2’s testimony that his son was still able to speak, as the doctor conducted the stitching operation; he asked what had happened; and the deceased said “he had no energy to speak, but was being killed by **Angeline** and **Sammy**.” The doctor told PW2 that the injury on the deceased was a deep cut, and that it was necessary to take him to Kenyatta National Hospital, for an X-Ray, to determine the nature of the injury.

PW2 had not known who **Sammy** and **Angeline** were; and he asked **Kamau** who they were. It turned out that **Sammy** (2nd accused) was one of those present and struggling to save the deceased’s life; in PW2’s words:

“...he [**Sammy**] was holding the deceased, by way of helping. I moved close, and asked that these people continue helping. And they [**including Sammy**] continued to help.”

It turned out that the motor vehicle to take the deceased to Kenyatta National Hospital was unable to access the slum area where he was lying; and so it fell on the same young men, including 2nd accused, to carry the deceased over a substantial distance, up to **Kamau’s** place which could be accessed by motor

vehicle. It was PW2's testimony that **Sammy** (2nd accused) was the one fanning the deceased to keep him alive, and that even after it became clear the deceased was already dead, while still lying at **Kamau's** place, **Sammy** kept on fanning him, and PW2 encouraged him to continue with the fanning.

When PW2's nephew, **Maingi** came in a motor vehicle, several persons, including PW2 went in it to **Sammy's** dwelling; they left the deceased lying at **Kamau's** place; and PW2 thus describes what they found:

"We found blood in **Sammy's** house. **Angeline's** house was next to **Sammy's**; it had blood too. We found much blood on the floor."

The whole group then went up to Embakasi Police Station. PW2, **Maingi**, and some nine young men. They reported to a Police Inspector who then conducted interviews; and he joined the group as they went up to **Kamau's** house; they also went up to Villa Police Post; and they returned to **Kamau's** place, and took the body to the mortuary. On returning to Villa Police Post, certain arrests were made, and **Sammy** was one of those arrested. Thereafter, a search was made for **Angeline**, and she was found in her house.

It was PW2's evidence that **Angeline** (1st accused) had hidden bloody clothes in her ceiling – a pair of blue Jeans trousers and a blouse – and that in his presence, the Police officers recovered these, and took them away. He said the said trousers were wet at the time, and he identified in Court a pair of trousers, as the one he saw on the material date. The witness said he also saw a kitchen knife recovered by the Police officers, not inside the house of **Sammy** or that of **Angeline**, but in a trench outside. PW2 testified that the said kitchen knife, which had blood stains, was taken by the Police officers; and that **Angeline** was arrested and taken to the Police station.

PW2 testified that the deceased, at the material time, had been wearing brownish trousers and a T-shirt, and that the same were muddy and bloody.

On cross-examination, PW2 said he thought those present when the deceased blamed **Angeline** and **Sammy** for his mortal injury, would have heard the statement; "his voice would have reached all of them, though it was low, he was speaking in pain."

Learned counsel sought, in cross-examination, to confirm the manner in which PW2 related to 2nd accused, on the material day; and PW2 said:

"It is true. **Sammy** from the time I met him, was with us, up to the mortuary when we took the body there If I had asked **Sammy** questions, he would have disappeared."

Corporal Stephen Nyamai (PW3) came into the picture well after the material date; he went, in the company of **Police Constable Ndung'u** (PW11), to the City Mortuary, and PW11 showed him the body of the deceased. PW3 found the body of the deceased to have chest stitches, and he took three photographs of the same.

Patrick Aswani Lumbasio (PW4) who works as a barber, and lives at Mukuru Kwa Njenga, was watching video displays with his friends (one being **Samuel Mbugua** (2nd accused), another being **Philip** [?]), and another being **Nicholas** [deceased]) at 7.30p.m.; then both 2nd accused and deceased left him and went out. Some 30 minutes later [and that would be at about 8.00pm], something had happened to the deceased: **Angeline** [1st accused] came to the video shop - to call **Philip** and PW4. What did 1st accused say? In the words of PW4, "She said our friends were fighting. **Samuel** [2nd accused] was the one being beaten" PW4 and **Philip** went to check; what did they find: "We found the deceased [**Nicholas**] stabbed with a knife. He was down. **Samuel** [2nd accused] was there. Others were there too. I did not know the rest."

It was PW4's testimony that **Nicholas** had been stabbed in the chest; blood was gushing from the stab-wound; he was not talking; but "he was alive, his heart was beating"; 2nd accused was giving help. PW4

asked 2nd accused if he knew what had befallen **Nicholas**; and 2nd accused said: “it’s like he is stabbed.” PW4 and others found a wheelbarrow, which they used to take **Nicholas** to a clinic in the neighbourhood.

PW4 and others were able to reach the deceased’s sister, and they also found the deceased’s father – and informed them of the incident; following which they returned to the clinic, and found that a stitching operation had been carried out on the deceased. While at the clinic, the deceased was still able to speak; when his sister asked what had happened, he mentioned only the part-name “**Ange**”; but he said nothing else about **Ange**. The deceased died at about 11.00p.m; and his father and PW4 then went to make a report of the incident at Villa Police Post. The two were given a Police motor vehicle, which transported the body to the City Mortuary; and thereafter, 2nd accused, PW4 and **Philip** returned to the Police Post.

PW4 upon hearing the deceased mention the name **Ange**, assumed the reference was to **Angeline** [1st accused] who was a *friend to PW4 and his friends such as 2nd accused and Philip* (who was brother to 2nd accused).

It was PW4’s testimony that when 1st accused approached him and **Philip** in the video shop saying: “Your brother is being beaten up,” she could *not* have been saying the truth, because **Samuel Mbugua** [2nd accused] was not being beaten.

PW4 testified that 1st accused and 2nd accused lived in separate dwelling units, separated by only one unit, inside the same plot which had a gate, and **Nicholas** after being stabbed, was found lying just outside the said gate, bleeding profusely.

It emerged, during cross-examination by learned counsel **Mr. Wamwayi**, that PW4 had recorded in his statement with the Police, on 23rd August, 2004 that **Angeline** (1st accused) had indicated that the fight she went to report at the video shop that evening, was taking place *inside her house* – and that the man bearing the brunt was **Samuel** (2nd accused). PW4 said 2nd accused was one of those who took the deceased to the clinic after the deceased was stabbed; and that later, he (PW4), 2nd accused, and **Philip** were arrested as suspects.

The pathologist, **Dr. Jane Wasike Siminyu** (PW5) who conducted the post-mortem examination on the deceased, on 3rd September, 2004, testified that the body was that of a twenty-four-year-old African male, in good physical and nutritional condition. External examination showed that the body had a penetrating wound on the right anterior chest-wall, measuring 3cm.; the causative instrument had run through the third intercostal space, puncturing the right lung which had collapsed, had lacerated the heart at the right atrium, and led to a one-litre blood accumulation in the thoracic cavity. Pw5 formed the opinion that the cause of death was the *penetrating chest injury*, and that a sharp object was responsible.

Police **Constable Francis Matheka** (PW7) escorted police **Constable Naphtaly Matundura** (PW9) on a search for 1st accused, on 24th August, 2004 at 6.00a.m. The two officers found and questioned 1st accused, who denied committing the offence; they found blood stains at the gate leading to 1st accused’s residence; they found blood-stained Jeans trousers on top of the roof of 1st accused’s dwelling; her explanation was that the Jeans trousers were bloodied while she was giving aid to the deceased, after he was injured. PW7 found blood stains close to the houses of 1st and 2nd accused. The 1st accused told PW7 that she had just seen “the man struggling outside, and she went to him to help.” She told PW7 that “she did not see anyone stabbing [deceased].” Some 6 – 7 metres from 1st accused’s house, PW7 found a kitchen knife dumped in swamp water; there was no sign of blood on the knife. PW7 and PW9 arrested 1st accused, and took her to the Police post.

Anthony Kamau (PW8) testified that he was at Classic Video Shop in Mukuru Kwa Njenga on the material evening, at 7.20p.m. watching video displays, when his friends **Philip** and **Patrick** (PW4) came to call him, and to let him know that another friend of his [the deceased] had been stabbed with a knife. The two asked PW8 to come with them to the house of the deceased’s sister, to make a report of the

incident; and when they got there, they found the deceased's father: and they all now proceeded to Alice Nursing Home in the vicinity, finding that a stitching operation had been done on the deceased, who was alive. PW8 and his friends asked **Nicholas** [deceased] what had happened; the answer was: "Wacha tu! **Ange**" – meaning: "Well, it's **Ange**"; he said this only once.

It was PW8's evidence that **Ange** was well known to him and his friends; he said: "We used to go to **Ange's** place, with other friends – myself, **Nicholas** [deceased], Patrick [PW4]." PW8 did not know of any special relationship between 1st accused and the deceased.

The doctor allowed PW8, PW4, PW2, **Philip** and deceased's sister to take the deceased away, after the stitching; and they took him to PW8's place and laid him down to rest; the deceased did not speak, as he was being transported – and after some 30 minutes, he died; his father checked his heart-beat, and found it motionless.

While the deceased was still at the nursing home, he spoke a little; and from what he said, PW2 asked PW8 "who **Sammy** was"; and PW8 showed him 2nd accused who was also present. Of **Sammy**, PW8 went on to say: "**Sammy** was a friend of **Nicholas** [deceased]; he was also my friend"; PW8 went on to say: "We all knew **Ange**. **Ange** was not at the nursing home."

On cross-examination by **Mr. Wamwayi**, PW8 spoke on **Ange** [1st accused] as she related to the deceased; he said:

"I didn't know **Ange** had a boy-friend. We used to just visit **Ange** as a friend – just to talk."

PW8 testified that while the deceased was at the nursing home, PW2 asked 2nd accused what had happened to PW2's son, and "**Sammy** said he did not know."

Police Constable **Naphtaly Matundura** (PW9) was attached to Villa Police Post at the material time, and at 4.00a.m. on 24th August, 2004 he received a telephone call from his superior officer, **Inspector Chemweno**. PW9 received instructions to proceed to the *locus in quo* and to conduct investigations. PW9 went with PW7 up to the scene, and found 1st accused, who said she had just seen the deceased on the outside, bleeding – but knew nothing about the cause of his injury. PW9 found in 1st accused's house a pair of Jeans trousers which had blood on them; it was hidden behind the door; and 1st accused said she had been assisting a stabbed man *to clear out of the compound*. On further checking, PW9 found a kitchen knife in a water-logged ditch in the 1st accused's compound; and she admitted that this was *her knife*, but she did not know how it had left her house.

PW9 formed the impression that there would have been people taking alcohol in 1st accused's house: "There were glasses which were smelling, about five [of them]. Neighbours said the lady sells liquor."

On cross-examination, PW9 said he had not seen blood stains in 1st accused's house; but on the outside, there were blood stains, spreading out *from that point up to the gate*. The deceased had no house in the compound that was the *locus in quo*; he "was staying with his sister, within the slums, on a different plot, some 500 metres away."

PW9 found out that the deceased *knew 1st accused*: "They were friends, [1st accused] told me; he used to go to her house – as a boy-friend."

Inspector **Noah Chemweno** (PW 13) gave evidence that, upon interrogating those first arrested in connection with the incident, he received information that during the hours of day leading to the material night, **Angeline Mora Omwenga** (1st accused) had been in her house in the company of **Sammy Mbugua** (2nd accused) and the deceased; but it was not possible to arrest 1st accused until the following morning. From his investigations, PW13 found it necessary to release **Philip Tabo** (not called as a witness) and **Patrick Aswani Lumbasio** (PW4); and he charged the two accused herein; he did so firstly,

because “they were the last people who were with the deceased; secondly, on the basis of statements by witnesses; and thirdly, because persons living in the neighbourhood of the *locus in quo* said “there had been in the night, a commotion and a fight in **Angeline’s** [1st accused] house.” The statement of **Mary Natecho Wasike** (not called as a witness), for example, confirmed that there had been a commotion in 1st accused’s house; 1st accused had conversed with deceased, and had asked him to leave; she had stabbed the deceased, then called a neighbour to help take him away. The witness said he had recorded statements from witnesses who last saw the deceased alive; who saw his movements throughout the day, up to the time of his death. PW13 said he arrested 2nd accused “because he was the last person with the deceased – as from the time he [deceased] left the video shop. He could not tell us he left the deceased anywhere, but at the *locus in quo*.”

C. ACCUSED PERSONS RAISING OBJECTIONS TO TRIAL, RELYING ON CONSTITUTIONAL GROUNDS

On 21st April, 2008, after 13 witnesses had given testimony, and the prosecution had *closed their case*, I made a *ruling*, the essence of which appears in the following excerpt:

“...I have come to the conclusion that a *prima facie* case has been made which calls for an answer. It is undesirable in this ruling to explain in detail the specific points at which the testimonies have pointed accusing fingers at the accused persons – as to do so may limit [such] strategy of defence as they may choose to [adopt]. I will merely state that certain pointed allegations have come through the evidence which the accused persons ought to be accorded an opportunity to respond to, if they are minded so to do.”

Although learned counsel **Mr. Tolo**, who on that occasion held brief for **Mr. Wamwayi**, indicated to the Court that the accused persons had elected to make unsworn defences, counsel, on 29th May, 2008 indicated that he would, instead, raise a *preliminary objection to the trial proceedings as a whole*, on grounds that there had been, at the very beginning, infringements on the accused persons’ trial-rights.

After hearing the objections, this Court, on 10th February, 2009 gave its reserved ruling, with the following dispositive paragraph:

“While it is difficult to say that the reasons for delay in bringing the accused persons before the Court, as given by the Investigating Officer, are the most cogent, they clearly indicate some of the difficulties facing the Police officers as they conducted investigations. I do not think it is a responsible exercise of the judicial function to cast away the work already done by the Police, considering that this is a murder case, and the deceased sacrificed a most fundamental human right.

“As already noted, all the 13 witnesses have been heard, and the Court has devoted much precious time to that task. In that process, the Court was obviously conducting a *constitutional function* running in parallel with the accused persons’ constitutional-rights claims. They have, in the circumstances, no right standing alone, and which they can simply take, whereunder this Court will be *bound* to acquit them prematurely.”

D. STATEMENTS OF THE ACCUSED PERSONS IN DEFENCE

Hearing resumed on 11th March, 2009, and on that occasion the

1st accused said in an unsworn statement that on the material day she went to the Church, returned home and left to play football, and finally returned to the house at 6.30p.m. She remained alone in the house until 7.00p.m., when *some drunken man* pushed her door and entered. This man is *not identified* in the 1st

accused's evidence; it is only stated that he pushed 1st accused, boxed her, and removed her blouse, and then hit her again; she fell; the utensils in her small, one - roomed house also fell in the melee; the man stepped on her leg, ordered her to be silent, started pulling off her trousers, picked up a knife fallen with the utensils; and she screamed, and was in a physical struggle with the man; the man hit her on the mouth, and threatened to stab her with the knife; he pulled down her pair of trousers; the knife fell, and as he struggled to retrieve it the 1st accused got hold of it; it stabbed the man entirely without her knowledge; and this did the trick: the man, in blood, left the room and there was already a crowd of onlookers outside. It was 1st accused's evidence that she did not immediately leave the house: she took her time, dressed up, and later went outside, only to find the same man lying on the ground, in a pool of blood, and surrounded by on-lookers. This is when, according to 1st accused, she found **Samuel Mbugua Maina [Sammy]** to help her carry the injured man to the gate of the plot; she said **Sammy** had not been with her, but she found him outside the gate.

It is significant that 1st accused, in her statement, *denied any knowledge of the man* who fell in a pool of blood, at her door-step; she said:

“The man who came to my house, I didn't know him.”

But she appeared to contradict that statement, almost immediately; she said:

“That man was a friend of **Sammy**; but I didn't know where he lived.”

She said the knife which Police officers recovered from the water-logged trench in her compound, was *“the one we had been struggling for, on the material night.”*

The 2nd accused said he was a student at an Academy in Nakuru, and had come to his brother's house, at 7.30pm on the material date. He was in his brother's house making supper, when he heard noises outside the plot; somebody was calling **Sammy** [himself], and the voice was familiar; when he came out, he found a man, lying *outside* the plot, covered with blood; he (2nd accused) and a neighbour [whose name is not given] now carried this injured man “to the outside plot.” Did he know this injured man? The 2nd accused said:

“I know the person; I used to see him at the Video Shop, where my brother was working.”

The second accused further says:

“My neighbour went to the Video shop, and came with my brother. **Angeline** [1st accused] is the one who went to the Video shop, and came with them my brother came.”

The 2nd accused said that some Good Samaritan brought a wheelbarrow and a torch, and with the torch-light, he noticed that the deceased was bleeding profusely in the left chest, which bore a knife-stab mark. The 2nd accused does not say where **Angeline Mora Omwenga** (1st accused) then went; but it is with the help of **Patrick Aswani** (PW4), “a great friend of the deceased”, that he put the deceased in the wheelbarrow, and carted the deceased off to Alice Nursing Home, one kilometre away. PW4, who knew the deceased's father and sister, went and led them to Alice Nursing Home; and when they arrived, they found 2nd accused holding the deceased, who was still alive and had just had a stitching operation. The doctor advised that the deceased be taken to Kenyatta National Hospital for better medical care; and his father helped 2nd accused and others to get the deceased to the place where **Anthony Kamau** (PW8) lived – about one-and-a-half kilometres away. PW2 then called a Police driver to come and take the deceased to Kenyatta National Hospital, but by the time this driver arrived, the deceased had died. The 2nd accused, and those in his company, now proceeded to Embakasi Police Station, to make a report. The 2nd accused, **Aswani** (PW4) and one **Philip** were held for several days, but subsequently they were released, while 2nd accused was charged, alongside 1st accused.

The 2nd accused denied any involvement in the stabbing of the deceased; and he remarked his constant role in giving aid to the deceased: taking the deceased to the nursing home in a wheelbarrow; and carrying the deceased by hand to **Kamau's** (PW8) place, some one-and-a-half kilometres away.

E. FIRST ACCUSED ACTED IN SELF-DEFENCE, OR WAS PROVOKED, IT IS NOT A CASE OF MURDER; SECOND APPELLANT CAME TO ASSIST, FOLLOWING THE INCIDENT: SUBMISSIONS FOR THE DEFENCE

Learned counsel **Mr. Wamwayi** made submissions on the evidence, remarking that it was 1st accused who approached PW4 and one **Philip** at the Video shop very soon after the material incident; and the information she gave was that, somewhere by her house, "**Philip's** brother [2nd accused] was being beaten;" but when the two men went over to the scene, they found not **Philip's** brother being beaten, but the *deceased* lying in blood, close to the gate leading to 1st accused's compound. **Samuel Mbugua Maina** [2nd accused] who was said to be "being beaten", was one of those actively helping the deceased as he lay at the gate. **Samuel Mbugua Maina** did not give PW4 the impression that he knew what had happened to the deceased; he had told PW4:

"It's like he is stabbed."

Learned counsel discounted the suggestion in PW2's evidence, that he (PW2) heard the deceased, as he lay at the clinic, saying that 1st and 2nd accused were responsible for his injury; his reason was that 2nd accused had been one of the most generous persons in giving aid to the deceased, throughout from the time he was injured to the very end, when he died, and 2nd accused had made no attempt to escape from the view of the deceased relatives, or of the Police authorities.

Mr. Wamwayi typified PW4 (**Patrick Aswani Lumbasio**) and PW8 (**Anthony Kamau**) as key witnesses, and urged that only the name **Ange** (for **Angeline** – 1st accused) had been mentioned by the deceased, in connection with the fatal stab on the material evening; in counsel's words: "The deceased never mentioned **Samuel Mbugua Maina** [2nd accused] at all"; and counsel urged: "That version given by PW2 [– that those killing the deceased were 1st and 2nd accused –] is not corroborated by PW4 and PW8 who heard what was being said [by the deceased]." Counsel went on to submit:

"The conduct of 2nd accused right from the gate, wheeling the deceased in a wheelbarrow to the clinic, then to **Kamau's** [PW8] place; and at the clinic, was holding the deceased – and even the father of the deceased was encouraging him to continue helping; even after the deceased died, the father of the deceased asked him [2nd accused] to continue fanning the deceased."

From such a fact-scenario, **Mr. Wamwayi** urged:

"This is the conduct of an innocent person in distress; a Good Samaritan, who never abandoned **Nicholas** [deceased]"

Learned counsel submitted that 2nd accused was up against "mere suspicion" emanating from Police officers such as PW9 and PW13 – and the basis of this suspicion is that 2nd accused "was one of the last to be seen with the deceased"; it is precisely that suspicion which had led to the arrest of **Philip** and PW4. Counsel urged that suspicion alone could not sustain a conviction, and that there was a duty resting on the prosecution to prove their case against 2nd accused beyond all reasonable doubt. Counsel called for the acquittal of 2nd accused, on the ground that, against him, there had been no proof beyond reasonable doubt.

As regards 1st accused, counsel submitted that the statement of **Mary Natecho Wasike** (not called as a witness) should be taken into account, since this particular statement taken by the Police had been marked as a *Defence Exhibit* (D Exh. 2) – and it is recorded in this statement from a neighbour of 1st accused, that

at the material time, “there was a commotion in the room of **Angelina** [1st accused].” It is recorded that **Mary Natecho Wasike** heard her neighbour, 1st accused, get out of her house at 8.30pm on the material evening. According to **Mary Natecho Wasike’s** statement, **Angeline** (1st accused) screamed, after a commotion involving an unknown man. It is recorded in **Mary Natecho Wasike’s** statement that she saw that a man had fallen *at the door of 1st accused*, and he was bleeding from the chest, and talking in a low tone; it is 1st accused who called two men, to help take the deceased to hospital; but these men declined, saying the prostrate man was bleeding so much, he could not reach hospital while still alive. It is recorded in **Mary Natecho Wasike’s** statement that a man who lives in the same plot with 1st accused, helped 1st accused to take the deceased *outside the gate* leading to the plot. And **Mary Natecho Wasike** records that she saw a man lending his wheelbarrow, at the said gate, to be used in giving aid to the deceased. And it was the Investigating Officer’s (PW13) testimony that he recorded the said statement of **Mary Natecho Wasike**.

PW13, in the course of his investigations, found that there had been a commotion *inside 1st accused’s house*, with 1st accused asking a man to leave her house; and at this moment, *1st accused stabbed the deceased*, and then called neighbours to help take him to hospital.

Learned counsel restated 1st accused’s position, that she *did not know the deceased*, though she had seen him occasionally with 2nd accused; and that on the material evening the deceased was an unwelcome intruder and even a likely rapist, as he entered 1st accused’s house – somebody to be repulsed in self-defence, or somebody whose conduct was highly provocative. Counsel urged that the fateful knife was initially the deceased’s weapon to occasion harm, and that it was purely accidental, that 1st accused’s struggle to take charge of this knife, resulted in a stab that led to the death of the deceased. Counsel submitted:

“The deceased was now bleeding in **Angeline’s** room. She went to call her neighbour **Sammy** [2nd accused] who helped to carry the intruder to the gate, before she went to the Video shop to call **Philip**.”

Mr. Wamwayi submitted that the evidence that 1st accused is the one who stabbed the deceased, by itself, did not prove the charge of murder; because of the pertinence of the defences of *provocation* and *self-defence*.

Counsel submitted that 1st accused, at the material time, had been in *her* house; and the deceased’s house was, by the evidence, 500 metres away; and therefore he was intruding upon 1st accused; in the words of counsel:

“She [1st accused] apprehended force from the deceased; the deceased assaulted her inside her house; he was out to rape her, or attempted to do so When one is under attack, one is entitled to use force to overcome the attack, including deadly force.”

Counsel relied on the Court of Appeal decision in **David Lentiyo v. Republic**, Crim. Appeal No. 181 of 2005 (Nakuru), in which the following paragraph appears:

It is to be emphasized that in a case of self-defence, if an accused finds he is in evident danger from his opponent, he must retreat from the danger but, if he finds that he cannot retreat further, then he can use force to defend himself.”

It is not excessive force, in the instant case – counsel urged – that 1st accused used when she stabbed the deceased: for it was one single stab-wound to the chest; and 1st accused had given an explanation – the act of stabbing took place during a scramble for the knife. Counsel proposed as the relevant question, in determining the issue: “Could a reasonable person have done what [1st accused] did?” And yes, in counsel’s view; there was an attacker in her house, and it was right she should respond defensively.

Learned counsel submitted that if 1st accused is not found to have been involved in lawful *self-defence*, then the defence of *provocation* should apply; and that she had acted on the heat of the moment, when she was provoked beyond endurance. In the event the defence of provocation was allowed, it was urged, then the offence committed would be *manslaughter*, and not murder. Counsel drew an analogy between this case and that in ***Eugene Lubangi v. Republic***, Crim. Appeal No. 63 of 2006 (Mombasa); in that case the position is set out in the Court of Appeal decision:

“There was evidence that, on the deceased hearing threats by the appellant against his life, he went to the appellant’s house in the wee hours of the night despite others telling him not to do so. The appellant was at that time asleep with his family that included a young baby in his house. Under these circumstances, one cannot rule out the appellant feeling provoked

“We do agree with learned counsel for both the appellant and the State that the defence of provocation was available in this case. In the circumstances, we allow the appeal against the offence of murder and set aside the conviction and sentence of death. We substitute in its place [a] conviction for manslaughter under section 207 of the Penal Code.”

F. FIRST ACCUSED APPLIED LETHAL FORCE TO KNOWN PERSON; SECOND ACCUSED RESPONDED - NOT, TO DYING DECLARATION: SUBMISSIONS FOR THE PROSECUTION

Learned prosecution counsel, **Ms. Mwanza**, submitted that both *mens rea* and *actus reus* had been proved, and so the accused persons should be found guilty of murder. She urged that the pathologist (PW5) had shown through the post-mortem report that the death of the deceased was occasioned by a stab-wound to the chest; that the profound severity of the stab-wound, which affected the lung and the heart, took it out of the category of the ordinary, and proved intention to kill. Counsel urged it to be relevant that the blood of the deceased had been found next to the door of 1st accused’s house, and also near 2nd accused’s house. Counsel urged that the evidence showed 1st accused to be the author of the deceased’s death: the accused had been heard attributing his condition to **Ange** (1st accused) and **Sammy** (2nd accused).

Counsel submitted that the accused persons had not made truthful statements on their relationship with the deceased; and in particular 1st accused had denied knowledge of the deceased: PW4 and PW8 had confirmed that they were friends with the deceased and that the lot of them being friends *inter se*, were also friends to 1st accused; and in PW9’s evidence, 1st accused had said she was a friend of the deceased.

Counsel contested the contention for the defence, that the deceased came to 1st accused’s house as a stranger and an apparent rapist; in counsel’s words: “The 1st accused never stated that at the time she made her reports; only five years down the line, is she now saying the deceased attempted to rape her? The issue of rape does not arise.”

Ms. Mwanza submitted that the accused persons had had the *intent to cause grievous harm* – and that this showed their malice aforethought; use of force on the scale that killed the deceased, counsel urged, showed “intent to inflict grievous harm – and this constitutes malice aforethought.”

Counsel doubted that 1st accused was in any real danger at the material time. She urged that the Court of Appeal decision, ***David Lentiyo v. Republic***, Crim. Appeal No. 181 of 2005 carried no principle of an unqualified notion of self-defence, as a reply to a charge of murder; “the person against whom a violent felony is being attempted may use force – but *reasonable apprehension* must be present.”

Of 2nd accused, learned counsel thus submitted:

“The basis of the arrest of 2nd accused was that, before the deceased died, [the deceased] mentioned him as one of those causing [the deceased’s] death. [And] when the name of 2nd accused was being mentioned by the deceased, he took no action to clear his name.”

G. ASSESSMENT OF EVIDENCE AND SUBMISSIONS, AND DETERMINATION OF THE QUESTION

(a) *Does Complicity arise from failure to respond to*

Dying Declaration? 2nd Accused's position

In all her submissions, learned counsel **Ms. Mwanza** connected 2nd accused to the death of the deceased on the basis of two criteria only: blood, appearing to be that of the deceased, was found close to 2nd accused's house; and, deceased as he breathed his last, blamed **Ange** and **Sammy** for the tragedy afflicting him. Learned counsel contends that **Sammy** failed to clear his name, from the claim in the dying declaration.

From the evidence, 2nd accused's house was quite close to 1st accused's – and so the fact by itself that the deceased's blood was found close to both houses, would not prove the charge.

Was it practicable, given the prevailing circumstances, that 2nd accused would respond to an implicatory utterance from the deceased. No, I would take judicial notice. It was in the first place not possible for 2nd accused to confront the deceased, as the deceased lay, dying. Secondly, the setting was for according the deceased aid; and indeed, 2nd accused, by the evidence, was the principal giver of that aid. Thirdly, in the situation of agony then prevailing, it was not to be expected that 2nd accused should open a pre-emptive, defensive argument about the cause of death.

Other than in PW4's evidence, in which it is stated that 2nd accused and deceased simultaneously left the Video shop at 7.30pm, there is no other evidence saying the two remained together up to the material time; it is not clear the two were in 1st accused's house together at the material time; it is unclear where 1st accused found 2nd accused, when she asked 2nd accused to help in carrying injured **Nicholas** to the gate. The doubt which remains on these questions means that, in law, it is not proved that 2nd accused had a hand in the fatal stabbing of the deceased; and this fact is to be taken together with the negating, abundant evidence, that 2nd accused not only did not try to escape, but was the main provider of aid to the deceased as he lay dying.

From these inferences to be drawn from the evidence, it must be held that no case has been made against 2nd accused, and he will be entitled to acquittal.

(b) *Was First Accused defending herself?*

No further evidence is required on the cause of the deceased's death; 1st accused caused it. Was she defending herself? Was there a life-threatening attack on 1st accused, by the deceased?

In 1st accused's unsworn statement, she made certain claims which are not supported by the evidence. She *denied knowing the deceased*; but there is reliable evidence on record to the contrary; the deceased was a friend of hers. The 1st accused said it was in a scramble for the kitchen-knife, that it accidentally injured the deceased; but the pathologist's evidence was quite clear – that this was a *powerful stab* into the chest, which damaged the lung, as well as the heart.

From the evidence, the conclusion is to be drawn that no threatening situation existed in 1st accused's house which justified the killing of the deceased. There is hardly any basis for accepting the explanation of the fatal stabbing as having arisen from an attempted rape. The evidence shows that there would have been a quarrel between 1st accused, and a person who was *well known to her*; and it was unlawful for her to effect the mortal knife-stroke.

It emerges from the foregoing analysis that a pre-medicated killing is not evident; and there was no proof

beyond reasonable doubt of intentional killing, such as would qualify as *murder*.

(c) Was there Provocation?

No circumstances have been brought before this Court such as would show any provocation, such as could reasonably be expected to lead to the killing of the deceased. As already noted, it is not possible to say the deceased had posed any serious threat to 1st accused, at the material time; but *somehow*, 1st accused flew into a rage and struck the mortal blow. Such an act, which runs against all reason, and causes the death of a person, is *unlawful*, and consequently, the resulting death is *manslaughter*, as defined in s. 202(1) of the Penal Code (Cap. 63, Laws of Kenya):

“Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.”

On the evidence adduced in Court, I find the 1st accused to have committed the offence of manslaughter; and consequently I substitute the charge of murder with one of manslaughter, and find the 1st accused guilty, and convict her accordingly.

(d) Orders & Directions

- (i) I hereby acquit 2nd accused, and he shall forthwith be set at liberty.
- (ii) I find 1st accused guilty of manslaughter, and convict her accordingly.
- (iii) I hereby accord 1st accused an opportunity to make a statement in mitigation, before I pronounce the sentence to be imposed against her.

(e) First Accused's Statement in Mitigation

MITIGATION STATEMENT

Mr. Wamwayi

- Arrest: 23/8/04
- Was only 17 years old.
- While waiting trial – accommodated at Nairobi Children's Remand Home – Kabete.
- Has been of good behaviour.
- She is a leader of the girls at the Institution – Captain.
- Background of poverty.
- Parents separated.
- Brought up by mother.
- Left school after standard 8.
- Lack of fees.
- Was staying with sister.

- Mother stays in Kisii; is sickly.
- Mother suffered severe burns some time back.
- While at Remand Home, has been taught things – to help in her adult life.
- She has learned tailoring.
- She can now plait hair – a hair salon capability.
- She can apply manicure and pedicure.
- She has been attending counselling at the Institution.
- Court do consider the antecedents of the offence.
- She asks court to take into account that she is most remorseful.
- Regrettable the deceased lost her life.
- These be weighed into the assessment – as against the aggravating factors.
- Award a non-custodial sentence.
- To enable 1st accused to reflect on her life.

Ms. Mwanza

- No previous record.
- She be treated as 1st offender.
- Nothing else.

Court – I have heard the representations made in mitigation, and the Court shall have them in mind. But before that is done, a Probation Officer’s Report on the 1st accused is essential.

It is now ordered as follows:

1. The Principal Deputy Registrar shall requisition from the Probation Officer a report on 1st accused – on the basis of priority.
2. This matter shall be listed for mention on 15/7/09 at 2.30p.m. – for record and sentence.
3. 1st accused shall continue to be held in custody.

Orders accordingly.

J.B. OJWANG

JUDGE

8/7/09

(f) *Sentence against 1st Accused.*

Deferred to date when Probation Officer's Report is received.

Orders accordingly.

DATED and DELIVERED at Nairobi this 8th day of July, 2009.

J.B. OJWANG

JUDGE.

Coram: Ojwang, J.

Court Clerk: Huka

For Accused: Mr. Wamwayi

For Prosecution: Mrs Mwanza

15/7/09

Ojwang, J

Huka – court clerk

For the accused – Mr. Wamwayi

For the State – Mr. Onyiso holding brief for Ms. Mwanza

Probation Officer – Mrs. Kibwage

Mrs. Kibwage – I bring my report as Probation Officer.

Court: please read it out.

Mrs. Kibwage

- I prepared the report.
- Introduction.
- Social Inquiry conducted.
- The following interviewed –
- Mwanahidi Maa Agnes – mother.
- Felistas Kwamboka – sister – 18 years of age.
- Neighbours at Mukuru Kwa Njenga – Justus Nyachoka and Paul Musyoki.
- Deceased's sister –

Elizabeth Mweni,

Interviewed on phone.

- Kabete Children's Remand Home – also provided some information.
- Accused has been there for 3 years.
- I had court file for reference.
- Home and family background – born of Peter Omwenga and Mwanahidi Maa Agnes.
- Father from Kisii; mother from Meru.
- Since 2000 –

Parents separated.

- Father remained at rural home – Kisii.
- Mother relocated to Nairobi after separation.
- She has lived with her children at Mukuru Kwa Njenga since 2001.
- 4 siblings; offender is 2nd-born.
- Others – Peter Omwenga (idle at home); Felistas Kwamboka – casual labourer; Jacob Omwenga – has dropped out of school; he was in standard 6 – Our Lady of Nazareth – Kwa Njenga slums.
- Since parents' separation, father abandoned family and remarried.
- Mother unemployed; depends on Good Samaritans.
- 2003 – mother suffered burns – face and back; hospitalized for nearly 2 years.
- This affected her.
- She cannot stay in the sun; wounds did not heal well.
- Offender – comes from a very poor environment.
- Struggles to put food on the table.
- Offender born 1988, in Kisii.
- Parents then living at Kisii.
- She attended primary school in Kisii – up to standard II.
- Family moved to Nairobi – following separation.
- 2003 – completed standard 8 – but did not take exams.
- No certificate.
- She was helping mother to sell vegetables.
- She has no children.
- She claims to be a first offender.

- She admits offence.
- She says deceased attempted to rape her when she committed the offence.
- She used kitchen knife; stabbed in self-defence.
- She appears remorseful; pleads for mercy.
- Deceased's family has moved on with their lives – and were not willing to be interviewed.
- Sister to deceased said she has forgiven offender.

Recommendation

- Young girl.
- Aged 20.
- Under 18 when offence took place.
- She has remained in custody.
- She appears remorseful.
- Has learned that the offence is serious.
- She has gone through rehabilitation; she became the girls' captain while in custody.
- Now trained in tailoring and hairdressing.
- She is ready to make use of these skills.
- Her character has been good.
- A non-custodial sentence would benefit her.
- We recommend a probation sentence – so she undergoes counselling and rehabilitation.

Mr. Wamwayi

- I have nothing useful to add.

Mr. Onyiso.

- I have nothing to say.

SENTENCE

After taking the evidence and analyzing it, this Court found that the 1st accused had committed the offence of manslaughter. In the light of the detailed statement made in mitigation, the Court found it necessary to call for a Probation Officer's Report.

Today the Probation Officer has given a detailed report, which is based on the facts and circumstances surrounding the social life of the culprit.

Upon considering the Probation Officer's Report in detail. I will now make orders as follows:-

1. The 1st accused, who has been found guilty of manslaughter, shall be subject to probation for a period of 15 (fifteen) months; and in that period the Probation Officer shall make monthly reports to the Court, regarding her conduct.
2. During the period of probation, the 1st accused shall desist from committing any offence, and, should she default in this regard, the Court may make appropriate orders qualifying these orders.
3. The Probation Officer shall file monthly reports in Court, regarding due compliance with these orders.
4. Subject to the orders herein, the 1st accused shall forthwith be released from custody.

Orders accordingly.

DATED and DELIVERED at Nairobi this 15th day of July, 2009.

J.B. OJWANG

JUDGE.

Coram: Ojwang, J.

Court Clerk: Huka

For the Accused: Mr. Wamwayi

For the State: Mr. Onyiso holding brief Ms. Mwanza.

Probation Officer: Mrs. Kibwage